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In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

RICARDO AHUMADA-AGUILAR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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As the petition for a writ of certiorari explains, the court of appeals has declared an Act of Congress unconstitutional, and its decision squarely conflicts with *Nguyen* v. *Immigration & Naturalization Service*, 208 F.3d 528, 534-536 (2000), petition for cert. pending, No. 99-2071 (filed June 26, 2000), in which the Fifth Circuit held that 8 U.S.C. 1409(a) does not violate the equal protection rights of a citizen father of an illegitimate child born outside the United States. For both those reasons, the court of appeals' decision warrants this Court's intervention. We point out in the certiorari petition that if the Court reverses the Ninth Circuit's decision on third-party standing grounds, both the holding of unconstitutionality and the circuit conflict would be eliminated. The petition suggests that the

Court may therefore wish to consider summary reversal on standing grounds. See Pet. 16-17, 22, 23.

After our petition in this case was filed, however, the losing parties in *Nguyen* filed their own certiorari petition. For the reasons stated below, and in our response to the petition in *Nguyen*, we believe that *Nguyen* would provide a better vehicle than this case for ultimate resolution of the question whether Section 1409(a) violates the equal protection rights of citizen fathers. We therefore believe that, if the Court concludes that plenary review of the constitutional issue is warranted at this time, the Court should grant the petition in *Nguyen* and should hold the petition in the instant case pending its disposition of *Nguyen*.[1]

A. As the petition explains (at 10), respondent is entitled to assert the equal protection rights of his late father (Frederick Deutenberg) only if he can establish (1) a "hindrance" to Deutenberg's assertion of his own constitutional rights, and (2) a "close relation" between himself and his father. Those requirements "arise[] from the understanding that the third-party rightholder may not, in fact, wish to assert the claim in question, as well as from the belief that 'third parties themselves usually will be the best proponents of their rights.'" *Miller* v. *Albright*, 523 U.S. 420, 446 (1998) (O'Connor, J., concurring in the judgment) (quoting *Singleton* v. *Wulff*, 428 U.S. 106, 113-114 (1976) (opinion of Blackmun, J.)); see also *Gilmore* v. *Utah*, 429 U.S. 1012 (1976); *Amato* v. *Wilentz*, 952 F.2d 742, 751-752 (3d Cir. 1991).

Respondent satisfies neither the "hindrance" nor the "close relation" prong of the test for third-party

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[1] We are furnishing respondent's counsel with a copy of the response filed by the government in *Nguyen*.

standing, because there is no reason to believe that his late father—who became angry when respondent's mother announced her pregnancy, gave her a small suitcase and $75 to purchase a ticket back to Mexico several months prior to respondent's birth, and thereafter had no contact with either respondent or respondent's mother—would wish to assert a constitutional challenge to the statutory prerequisites for respondent to be a citizen. See Pet. 6, 14. Respondent contends (Br. in Opp. 14-20) that he satisfies both contested prongs of the third-party standing test.[2] Respondent's analysis of the requirements of third-party standing is misconceived.

1. Respondent contends that this Court has "[b]roadly interpret[ed] the term 'close relation'" and has "granted standing where the litigant and third party share a 'common interest' in the assertion of their rights, and the litigant possesses an incentive to effectively advance the claim." Br. in Opp. 15. Respondent's claim of a "common interest" between himself and his father appears to be based entirely on the assertions that "Frederick Deutenberg's ability to confer citizen-

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[2] Respondent also contends (Br. in Opp. 10-12) that the government has failed to preserve its challenge to respondent's third-party standing because it did not raise that issue until its petition for rehearing and rehearing en banc in this case. As a matter of circuit precedent, however, the issue of third-party standing was controlled by the Ninth Circuit's prior decision in *Wauchope* v. *United States Department of State*, 985 F.2d 1407, 1411 (1993), which upheld a child's standing to assert her deceased mother's equal protection rights in a citizenship transmission case. In those circumstances, the government's failure to raise the third-party standing issue in its submissions to the panel did not constitute a waiver of the argument. See *United States* v. *Williams*, 504 U.S. 36, 40-45 (1992).

ship to his son has been curtailed by arbitrary gender based discrimination," and that "[r]espondent has been denied United States citizenship based upon that discrimination." *Id.* at 15, 16. At bottom, respondent's claim of a "close relation" to his deceased father rests on nothing more than the fact that he has been harmed by a law that is alleged to have violated his father's constitutional rights. So construed, however, the "close relation" requirement would add nothing of substance to the requirement that the litigant demonstrate "injury in fact."[3]

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[3] Respondent does not contend that the genetic fact of paternity is by itself sufficient to establish the requisite "close relation" between respondent and his late father. For the most part, this Court's decisions recognizing third-party standing have involved relationships formed through the mutual consent of the litigant and the third party whose rights were asserted. See, *e.g.*, *Department of Labor* v. *Triplett*, 494 U.S. 715, 720-721 (1990) (lawyer and client); *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617, 623-624 n.3 (1989) (same); *Craig* v. *Boren*, 429 U.S. 190 (1976) (vendor and customer); *Singleton*, 428 U.S. at 114-115, 117 (opinion of Blackmun, J.) (doctor and patient).

Respondent suggests (Br. in Opp. 16) that the requisite "close relation" exists because respondent's criminal conviction will be reversed if his deceased father is held to have suffered an equal protection violation. That rationale lacks merit. Although a criminal defendant in respondent's position undoubtedly satisfies the "injury in fact" requirement, it is immaterial to the "hindrance" and "close relation" prongs of the third-party standing inquiry that the case arises in the context of a criminal prosecution. The rules of third-party standing apply equally in this setting. See, *e.g.*, *Campbell* v. *Louisiana*, 523 U.S. 392, 398 (1998); *Powers* v. *Ohio*, 499 U.S. 400, 411 (1991). In those cases, the Court held that a criminal defendant may raise the constitutional claims of petit and grand jurors who allegedly suffered discrimination on the basis of race. The Court explained that a criminal defendant is afforded the opportunity "to establish a relation, if not a bond of trust, with

2. Respondent also errs in asserting (Br. in Opp. 17-19) that he satisfies the "hindrance" requirement for third-party standing. Respondent was born in December 1971, and his natural father died in April 1994. See Pet. App. 3a-4a. Deutenberg had more than 22 years in which to assert his equal protection rights with respect to the transmission of citizenship to his son. (Of course, during the first 18 of those years, respondent's father could have transmitted citizenship to his son without asserting any constitutional claim, simply by complying with the requirements of 8 U.S.C. 1409(a).) During that 22-year period, however, the record reflects no contact between Deutenberg and respondent or respondent's mother, let alone any effort by Deutenberg to establish citizenship for his son or challenge the statutory limitations on his ability to do so.[4]

Of course, Deutenberg's death absolutely prevented him from asserting a constitutional claim on his own behalf at any time after April 1994. The purpose of the "hindrance" inquiry, however, is to identify those situations in which the third party's "absence from a suit more likely stems from disability than from disinterest. A hindrance signals that the rightholder did not simply decline to bring the claim on his own behalf, but could not in fact do so." *Miller*, 523 U.S. at 450 (O'Connor, J., concurring). Where (as here) the putative rightholder had an extended opportunity to assert his own equal protection rights, his death does not give rise to any

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the jurors." *Powers*, 499 U.S. at 413. No comparable bond exists in this case.

[4] Although petitioner claims that "Deutenberg vowed he would come find Genoveva Hernandez and his expectant child," Br. in Opp. 17 n.9 (citation omitted), Deutenberg had more than 22 years in which to undertake that task, and the record contains no evidence that he did so.

reasonable inference that his failure to sue "more likely stems from disability than from disinterest." *Ibid.* Nor is there any reason to suppose that United States citizen fathers of children born out of wedlock abroad are as a general matter unable to assert their own legal challenges to Section 1409(a)'s restrictions on their ability to transmit citizenship to their children.[5]

Respondent's reliance (Br. in Opp. 18) on *Hodel* v. *Irving*, 481 U.S. 704 (1987), is misplaced. At issue in that case was the validity of a statutory restriction on the ability of individual Indians to transmit their partial interests in trust land to their heirs. See *id.* at 709-710. The Court held that persons who would have inherited those partial interests could properly assert their decedents' constitutional challenge to the pertinent statutory provision. *Id.* at 711-712. In *Irving*, however, the claimed constitutional deprivation—*i.e.*, the taking of property without just compensation that was alleged to have occurred when the decedents' fractional

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[5] In discussing the "close relation" requirement of third-party standing doctrine, respondent frames the question as whether fathers and children *generally* share the requisite community of interests with respect to the rules governing the child's citizenship. Indeed, respondent opposes any version of the "close relation" test that would involve case-specific inquiry into the actual relationship (or lack thereof) between a particular father and child. See Br. in Opp. 16 ("While [the United States] focuses upon whether *individual* right holders would in fact have wanted to assert their rights, this Court did not find such an issue relevant when determining the presence of a close relation for purposes of third party standing."). Respondent's discussion of the "hindrance" requirement, by contrast, focuses entirely on the purported hindrance to a particular father's assertion of his own constitutional claim—*i.e.*, the fact that Deutenberg's death currently prevents him from challenging the prerequisite that Section 1409(a) establishes for his son to be a citizen.

interests escheated to the Tribe by operation of law, rather than passing to the plaintiffs through devise or intestacy, see *id.* at 709-710—itself occurred only upon the death of the rightholder. To treat the rightholder's death as a "hindrance" for purposes of third-party standing is appropriate where the rightholder's injury does not become concrete until the time of his death. See also *id.* at 712 ("permitting appellees to raise their decedents' claims is merely an extension of the common law's provision for appointment of a decedent's representative" to protect the estate). Here, by contrast, the gravamen of respondent's constitutional challenge is that his father suffered a continuing deprivation of equal protection rights throughout the 22-year period between respondent's birth and Deutenberg's death.[6]

B. As the petition explains (at 20-22), the court of appeals' decision in this case squarely conflicts with the Fifth Circuit's decision in *Nguyen*, which held that Section 1409(a) does not violate the equal protection rights of citizen fathers. Respondent suggests (Br. in Opp. 20-21) that review of this case is not warranted because the Fifth and Ninth Circuits both applied heightened scrutiny in reviewing the plaintiffs' constitutional challenges to Section 1409(a). We believe that heightened scrutiny is inappropriate in this context, since respondent's constitutional claim implicates Congress's very broad power over matters of immigration and nationality, and since the challenged statutory pro-

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[6] Moreover, in *Irving*, the parents died only a few months after the escheat law was passed, see 481 U.S. at 709, and they therefore had relatively little time to rearrange their affairs in response to the law (assuming they were even aware of it) or to file a lawsuit challenging its constitutionality. See also *id.* at 728, 732-734 (Stevens, J., concurring in the judgment).

vision defines the legal significance of events occurring in a foreign country, where one of the parents is an alien. See Pet. 17-18. But in any event, the absence of a circuit split on the subsidiary question of what standard of review applies cannot obscure the square circuit conflict regarding the constitutionality of Section 1409(a). The court of appeals has taken the grave step of holding an Act of Congress unconstitutional, and in the process has upset the "uniform Rule of Naturalization * * * throughout the United States." U.S. Const. Art. I, § 8, Cl. 4; see Pet. 17. That holding, as well as the Ninth Circuit's declaration that respondent is a citizen even though no Act of Congress confers citizenship on him, plainly warrants intervention by this Court.

C. After our petition in the instant case was filed, the losing parties in *Nguyen* filed a petition for a writ of certiorari, which is currently pending before this Court. See *Nguyen* v. *Immigration & Naturalization Serv.*, No. 99-2071 (filed June 26, 2000). As our response to the petition in that case explains (at 6-8), if the Court concludes that plenary review of the equal protection issue is appropriate at this time, we believe that *Nguyen* provides the better vehicle for ultimate resolution of that issue. Unlike the instant case, *Nguyen* presents no third-party standing question, because the father whose equal protection rights are alleged to have been violated was a party in the court of appeals and is a petitioner in this Court. Although we believe that the Ninth Circuit erred in this case in permitting respondent to assert his deceased father's equal protection rights, we do not believe that the third-party standing

issue is itself of sufficient importance to warrant this Court's review.[7]

We suggested in our certiorari petition that the Court nevertheless might wish to grant certiorari and summarily reverse the judgment of the court of appeals on third-party standing grounds. The petition explained that summary reversal on that ground would eliminate the Ninth Circuit's judgment holding an Act of Congress unconstitutional, the circuit conflict on that issue, and the possibility that the Court might grant plenary review because of the constitutional issue but then, as in *Miller*, be unable to decide it because of the threshold standing obstacle. See Pet. 16-17, 22, 23. However, now that a certiorari petition has been filed seeking review of the Fifth Circuit's decision in *Nguyen*, we believe, on balance, that the Court should grant certiorari in *Nguyen* to resolve the constitutional issue, since that case does not present a threshold standing obstacle.[8] If the Court follows that course, the

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[7] As the petition observes (at 16), moreover, reversal of the court of appeals' judgment on the same variety of grounds that led to this Court's affirmance of the judgment of the court of appeals in *Miller* would not finally resolve the question whether Section 1409(a) deprives citizen fathers of their right to equal protection of the laws.

[8] As our response to the petition in *Nguyen* explains (at 8 n.4), if the Court finds 8 U.S.C. 1409(a) to be unconstitutional, it will need to decide a remedial question presented but not resolved in *Miller*—*i.e.*, whether a court has power to declare petitioner Nguyen to be a citizen of the United States despite the absence of a statute conferring citizenship. Compare *Miller*, 523 U.S. at 452-459 (Scalia, J., concurring in the judgment) (concluding that a court lacks the power to confer citizenship on a foreign-born individual in the absence of a statute that provides for citizenship, even as a remedy for a constitutional infirmity in the citizenship statute itself), with *id.* at 445 n.26 (opinion of Stevens, J.) (noting but not

petition in the instant case should be held pending this Court's decision in *Nguyen* and then disposed of as appropriate in light of that decision. In the alternative, the Court may wish to consider summary reversal of the judgment of the court of appeals. See Pet. 16, 22, 23.

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The petition for a writ of certiorari should be held pending this Court's disposition of the petition in *Nguyen* v. *Immigration & Naturalization Service*, No. 99-2071, and then disposed of as appropriate in light of that disposition. In the alternative, the Court may wish to consider summary reversal of the judgment of the court of appeals.

Respectfully submitted.

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reaching remedial issue); *id.* at 451 (O'Connor, J., concurring in the judgment) (citing Justice Scalia's opinion and acknowledging the "potential problems with fashioning a remedy"); *id.* at 488-490 (Breyer, J., dissenting) (concluding that the Court may appropriately declare the plaintiff to be a citizen). See also *INS* v. *Pangilinan*, 486 U.S. 875, 885 (1988) (where Congress has set specific statutory limits on a provision for naturalization, "[n]either by application of the doctrine of estoppel, nor by invocation of equitable powers, nor by any other means does a court have the power to confer citizenship in violation of [those] limitations"). That remedial issue, however, will presumably be implicated by every constitutional challenge to Section 1409(a).